Nos. 91-155, 91-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,
Petitioners,

v.

WALTER LEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF MULTIMEDIA NEWSPAPER COMPANY, THE GREENVILLE NEWS-PIEDMONT COMPANY, THE ASHEVILLE CITIZEN-TIMES COMPANY, THE ADVERTISER COMPANY, LEAF-CHRONICLE COMPANY, BAXTER COUNTY NEWSPAPERS, INC., OHIO VALLEY PUBLISHING COMPANY, THE OBSERVER PUBLISHING COMPANY, AND STAUNTON LEADER PUBLISHING COMPANY IN SUPPORT OF AFFIRMANCE IN PART OF THE OPINION BELOW

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The companies listed below, through their undersigned counsel, respectfully move the Court for leave to file a brief *amici curiae*. The brief is not in support of either petitioners or respondent, but rather in support of partial affirmance of the opinion below.

The petitioners have consented to the filing of the brief; their letter of consent has been filed with the Clerk of Court. The respondent has refused such consent.

Movants are the owners of local newspapers of general circulation in various parts of the South and the Ohio Valley. Movants have an interest in the outcome of this proceeding because they consider the distribution of their newspapers in their communities' public airports to be of great import in their respective locales. Hence a decision by the Court in this case on the question whether the public areas of public airports are pub-

lic forums is of substantial concern to movants, both financially and philosophically.

Movants have reason to believe that the parties to this action may not present the facts or matters of law addressed in the within Brief *Amici Curiae*. In contrast to petitioners, movants seek only to distribute newspapers in public airports through vending machines, a passive means of distribution. Because petitioners also seek to solicit funds through active, personal interaction with people in airports, movants' perspective may be broader and perhaps more moderate than that of petitioners. In contrast to respondent, movants do not believe that all First Amendment activity in public airports should be left to the bureaucratic discretion of airport management, limited only by a "reasonableness" standard of judicial review.

For these reasons, the undersigned respectfully request the Court to grant leave to file the within Brief *Amici Curiae*.

Respectfully submitted,

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Movants:

Multimedia Newspaper Company, The Greenville News-Piedmont Company, The Asheville Citizen-Times Company, The Advertiser Company, Leaf-Chronicle Company, Baxter County Newspapers, Inc., Ohio Valley Publishing Company, The Observer Publishing Company, and Staunton Leader Publishing Company

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BRIEF *AMICI CURIAE* IN SUPPORT OF PARTIAL AFFIRMANCE

The undersigned respectfully submit this Brief *Amici Curiae* in support of neither petitioners nor respondent, but rather in support of affirming that part of the opinion below which held invalid the respondent's prohibition of the distribution of literature in the public areas of the airports.

INTEREST OF THE *AMICI CURIAE*

The *amici* are nine companies that publish daily and non-daily newspapers across the South and in the Ohio Valley. Included within this group are the publishers of the *Asheville Citizen-Times*, the largest newspaper in western North Carolina; the *Montgomery Advertiser* and *Alabama Journal*, the daily newspapers of the capital of Alabama; and *The Greenville News* and *The Greenville*

Piedmont, the largest newspapers in upstate South Carolina. The group also includes newspaper publishers of lesser size, such as the publisher of the *Daily News-Leader* in Staunton, Virginia, and the *Daily Sentinel* in Pomeroy-Middleport, Ohio. Though united under a common parent headquartered in South Carolina, they are all published independently.

The *amici* submit this brief not in favor of any of the litigants to this appeal, but rather in support of the proposition that public areas of public airports are public forums under the First Amendment. Regardless of the Court's determination of the other issues on appeal, it is of great importance to the *amici* for the Court to affirm the correctness of this proposition.

Through "an unusual consensus of judicial, legislative, and administrative opinion", *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 766 (D.C. Cir. 1983), virtually every court to address this issue has held that the public areas of public airports are public forums.[1] Yet not every state or federal circuit has been called upon to make that determination. For this reason, the issue, though litigated many times with virtually the identical result in every case, will continue to be litigated in the future until this Court plainly states its position.

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[1] *See also, e.g., Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Board of Airport Commissioners*, 785 F.2d 791, 793-95 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); *Fernandes v. Limmer*, 663 F.2d 619, 626-27 (5th Cir. 1981), *cert. denied*, 458 U.S. 1124 (1982); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 924-26 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *Gannett Satellite Information Network, Inc. v. Berger*, 716 F. Supp. 140, 149 (D.N.J. 1989), *aff'd on this ground and rev'd in part on other grounds*, 894 F.2d 61 (3d Cir. 1990); *Chicago Tribune Co. v. City of Chicago*, 705 F. Supp. 1345, 1347-48 (N.D. Ill. 1989).

Were the issue of only passing legal significance, litigation of the same issue, with the same result time after time, would be no more than grist for the lawyers handling those cases and for those who rightly complain of our courts being clogged with unnecessary matters.

But this issue is more. It is not only of constitutional dimension, but it also arises under the First Amendment, which this Court has recognized many times as requiring special solicitude. More importantly, it affects not just the Krishnas, or some other relatively small but noticeable element of our society. It affects everyone, including newspaper publishers of the type which have submitted this brief, because virtually everyone in this country uses the public areas of public airports many times during the courses of their lives. Those who ask to use these areas as public forums for legitimate First Amendment purposes should not be put to the considerable delay and enormous expense of protracted court battles to determine an issue that is as settled in the law as any can be without a clear statement from this Court. Those who have no such aims, but instead would simply hear or see the proffered communication, are entitled either to have it and have it promptly, or else to have the comfort of knowing that its denial was not the result of an airport manager's decision to use the public treasury to fight a battle that has been fought and lost elsewhere many times.

ARGUMENT

THE PUBLIC AREA OF A PUBLIC AIRPORT IS A PUBLIC FORUM.

The defining characteristics of a public forum are, first, that it be a place where people gather, and second, that it be an appropriate place for the expression and discussion of issues and ideas by the public at large. It is an unfortunate fact that the streets and parks of our country do not serve the same role for public gathering, discussion, and debate today as they did in 1791. Apart from privately owned shopping malls (in which the property owner may substantially restrict expressive activity[2]), increasingly today the public gathering places are governmentally owned transportation centers, such as bus terminals, railroad stations, and in particular, airports. In most cities today, the town square is a desert compared to the local public airport. The airport serves as a meeting place for businessmen and friends, a location for public announcements by political candidates and government officials, and a place where the public may shop, eat, have a drink, or sit and watch the airplanes or the people. In functional terms, the airport is an essential part of the daily commerce and movement of people, capital, and ideas in our local communities. All this is true not just of large airports such as the ones involved in the instant action, but also of the many smaller regional airports located throughout the country.

In evaluating whether such a gathering place is an appropriate locale for the free expression and discussion of issues and ideas by the public at large, two paramount concerns must be addressed: whether such freedom of expression would significantly undermine or threaten the legitimate primary activities of the facility, and whether, because of the physical structure of the facility, members of the public who use it for its primary purpose might

[2] *See Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

be forced to endure for more than a passing moment communications which they would prefer not to receive.

It is for these reasons that military bases and street cars are not public forums. *See Greer v. Spock*, 424 U.S. 828 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). It is for these reasons also that a narrow sidewalk leading only from a parking lot to a post office may not be a public forum, either. *See United States v. Kokinda*, —— U.S. ——, 110 S. Ct. 3115 (1990).

For these same reasons, the public area of a public airport is a public forum. Experience has shown that allowing it to be used for expressive purposes—subject to proper time, place, and manner restrictions—will not threaten or undermine the primary purpose of the airport. Further, the physical structure and customary use and features of the typical airport eliminate any possibility that it can be used by speakers to foist an unwanted message on a captive audience. The typical public airport is open, spacious, bustling, noisy, readily accessible to the public at large, and composed of a multitude of passageways on different levels.[3] It is quite common for public airports to contain banks, restaurants, lounges, outdoor terraces, gift shops, travel agencies, rental car bureaus, and numerous public seating areas, restrooms, and telephones—in short, precisely the types of commercial establishments and public facilities that one encounters on the streets of the local community. Vast numbers of people are freely admitted to public airports, and admission is not restricted to those who wish to use them solely in connection with air travel. Public airports function as major public thoroughfares and, for hundreds of millions of people a year, are the gateways to and from their respective communities.

[3] *Cf. Lehman*, 418 U.S. at 303 ("Here, we have no open spaces . . . or other public thoroughfare.") (plurality opinion).

In one of the formative decisions on public forums, the Court of Appeals for the Second Circuit described the physical characteristics of the Manhattan bus terminal that made it a public forum, using language directly applicable to public airports:

> "Unlike an office building corridor or an apartment house hallway, the people are not simply using the connecting passageway to reach a place where they engage in different, more pacific or reflective activities. They are in the Terminal for the principal purpose of moving to and from other means of transportation—and the space is designed for precisely the purpose of transit. With the scope of operations so vast, the enclosure is desirable and indeed necessary if the congestion and confusion that would attend if all waited for buses on the street are to be avoided. In other times or better climes travelers have waited by the roadside or under some shelter for the oncoming vehicle. But here, the buses drive into the building and the passengers meet them there. The terminal, with its many adjuncts, becomes something of a small city—but built indoors, with its 'streets' in effect set atop one another, . . . not unlike some futuristic design for urban living."

Wolin v. Port of New York Authority, 392 F.2d 83, 89 (2d Cir.) (citation omitted), *cert. denied*, 393 U.S. 940 (1968).[4]

In short, all of the physical and functional characteristics of the airport make it an appropriate place for

[4] *See also U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 766-67 (D.C. Cir. 1983) (distinguishing airport terminal from streetcars involved in *Lehman*); *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 579 F. Supp. 90, 96 (S.D.N.Y.) ("[U]nlike the streetcar in *Lehman*, [a commuter rail station] is not unduly confined, and contains waiting rooms, concourses, passageways, and platforms that are in many ways analogous to the street corners and meeting halls which are the traditional public forums."), *rev'd on other grounds*, 745 F.2d 767 (2d Cir. 1984).

the free exercise of speech and press, subject to such restrictions as are permissible in public forums.

> "The first amendment is not an abstract proposition; our society's commitment to free speech must exist in fact as well as in principle. In fact, the open, public areas of [the public airport] have become contemporary crossroads in which millions of people each year engage in a considerable amount of commercial, social, and political interchange. As the FAA itself recognizes, 'in many respects, the terminals are like any other public thoroughfare where there is no question that the constitutional guarantee[] of freedom of speech . . . app[lies].'"

U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 774 (D.C. Cir. 1983) (quoting 45 Fed. Reg. at 35,314) (brackets in original).

If public forum analysis is to retain its vitality in a changing society, the notion of the "traditional public forum" cannot be confined to streets and parks *per se*, and no Supreme Court precedent suggests that it should be so confined. To the contrary, in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court noted that traditional public forums are "those clearly held in trust, either by tradition *or by recent convention*, for the use of citizens at large." *Id.* at 815 n.32 (emphasis added).

If public forums exist only in the streets and parks and in those places which the government has devoted to unrestricted communicative activity, the continued existence of the public forum will come to rest wholly in the hands of the government as the streets and parks cease to be natural gathering places.[5] Such a result is

[5] The streets and parks themselves did not become public forums because the government opened them up for unrestricted expressive activity by the public; they became public forums because they were the natural gathering places of the people and because they were appropriate places for free expression and discussion. A colonial

fundamentally at odds with the First Amendment. Justice Kennedy cautioned in his opinion concurring in the judgment in *United States v. Kokinda*:

> "As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place.
>
> ". . .
>
> "If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case."

Id. at ——, 110 S. Ct. at 3125 (Kennedy, J., concurring in the judgment). As discussed above, both the "objective characteristics" and the "customary use" of the typical public airport give it the status of a public forum.

Recognition of the public areas of public airports as public forums will not mean the end of public air travel in a safe, orderly, and enjoyable manner. The government may regulate expression in a public forum. All that is required is that the regulation be content neutral, that it relate to the time, place, or manner of expression, that it be narrowly tailored to serve a significant governmental interest, and that it leave open adequate alternative channels of communication. *E.g., Ward v. Rock Against Racism*, —— U.S. ——, 109 S. Ct. 2746, 2753 (1989). Under this rule of law, airport managers have ample means to keep out bullhorns to limit the numbers of contemporaneous speakers, and to restrict or perhaps even prohibit highly intrusive personal solicitations of alms.

This country has drawn its strength and spirit from a free exchange of ideas, and often that exchange has

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patriot who wished to stir up the crowd against the British would use a street or park because he would have an audience there, not because the British allowed speeches in the streets and parks.

occurred in public forums. Often it has not been altogether pleasant at the time, but ultimately it has been good for our country and her people. Two centuries ago that exchange occurred on the commons of New England towns. Three decades ago it occurred on the sidewalks and statehouse grounds and in the bus stations of the South. As the lives of our people have changed, so too have their public forums, as indeed they must if the public forum is to serve effectively as the instrument of liberty which it always has been and always shall be under the First Amendment.

CONCLUSION

The Court should hold that the public area of a public airport is a public forum and affirm that part of the opinion below which invalidated respondent's prohibition of the distribution of literature.

Respectfully submitted,

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